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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JAMES REX ELLIOTT,

Plaintiff,

v.

JPMORGAN CHASE BANK, N.A., et al.,

Defendants.

3:11-cv-826-RCJ-VPC

ORDER

Currently before the Court is a motion to remand (#6) filed by the plaintiff and a motion to dismiss (#8) for failure to state a claim filed by California Reconveyance Company, JPMorgan Chase Bank, N.A., and Washington Mutual Bank, F.A., which was later joined by LSI Title Agency, Inc. For the following reasons, the motion to remand (#6) is denied and the motion to dismiss (#8) is granted in part and denied in part.

BACKGROUND¹

On January 23, 2007, Plaintiff James Elliott (a Nevada resident) purchased real property located at 2280 Silky Sullivan Lane, Reno, Nevada 89502 (the "Property"). (Compl. (#1-2) at 2, 5). To finance the purchase, Plaintiff obtained a \$240,000 loan from Washington Mutual Bank, F.A., which was secured by a deed of trust (the "Deed of Trust"). (Deed of Trust

¹ Defendants have requested judicial notice to be taken of attached copies of relevant publicly recorded documents. (See Mot. to Dismiss (#8) at 3 n.1). The Court takes judicial notice of these public records. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 (#8-1) at 2). The Deed of Trust listed Washington Mutual as lender and California
2 Reconveyance Company ("CRC") as trustee. (*Id.*). JPMorgan Chase Bank, N.A. later
3 acquired certain assets and liabilities of Washington Mutual from the FDIC. (Mot. to Dismiss
4 (#8) at 1).

5 Plaintiff later defaulted on the loan secured by the Deed of Trust. (Notice of Default
6 (#8-2)). CRC executed a notice of default on June 30, 2011, which was recorded by SPL, Inc.
7 on behalf of CRC. (*Id.*). Plaintiff alleges that after the notice of default was filed, he never
8 received a form indicating his right to elect mediation and that at no time did the foreclosing
9 parties obtain a certificate from the Nevada Mediation Program as required by NRS § 107.086.
10 (Compl. (#1-2) at 6). CRC later executed a notice of trustee's sale on October 6, 2011, which
11 was recorded by LSI Title Agency, Inc. on behalf of CRC on October 7, 2011. (Notice of
12 Trustee's Sale (#8-3)). Plaintiff then requested a statement regarding the secured debt from
13 the beneficiary of the Deed of Trust on November 1, 2011, but this request was allegedly
14 ignored. (Compl. (#1-2) at 7).

15 Plaintiff filed his complaint in Nevada state court on November 1, 2011 against
16 JPMorgan Chase; CRC; Washington Mutual; SPL, Inc.; and LSI Title Agency, Inc., alleging:
17 (1) wrongful foreclosure; (2) declaratory relief; and (3) injunctive relief. (Compl. (#1-2) at 1, 9-
18 12). JPMorgan Chase is a resident of Ohio, while CRC and LSI Title Agency are California
19 corporations. (*Id.* at 2-3; Opp'n to Mot. to Remand (#12) at 4). The citizenship of SPL, Inc.
20 is in dispute. The case was removed to this Court on November 16, 2011 by CRC under
21 diversity jurisdiction. (Pet. for Removal (#1)). Plaintiff filed a motion to remand the action to
22 state court on December 5, 2011. (Mot. to Remand (#6)). Defendants JPMorgan Chase (for
23 itself and as acquirer of certain assets and liabilities of Washington Mutual) and CRC filed a
24 motion to dismiss the complaint for failure to state a claim, which LSI Title Agency later joined
25 (collectively "Defendants"). (Mot. to Dismiss (#8); Joinder (#9)).

26 LEGAL STANDARD

27 I. Motion to Remand

28 A defendant may remove an action to federal court if the plaintiff could have initially filed

1 the complaint in federal court, 28 U.S.C. § 1441(a), *i.e.*, if the federal court has original
2 jurisdiction. The party seeking removal bears the burden of establishing jurisdiction by a
3 preponderance of the evidence. *Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d
4 1102, 1106-07 (9th Cir. 2010). If a case is removed and the federal court lacks jurisdiction
5 over the matter, the federal court must remand the case to state court. 28 U.S.C. § 1447(c).
6 The removal statutes are to be construed restrictively and any doubts about the right of
7 removal is resolved in favor of remand. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247,
8 1252 (9th Cir. 2006).

9 Federal courts have original jurisdiction over civil actions "where the matter in
10 controversy exceeds the sum or value of \$75,000" and the dispute is between "citizens of
11 different States" (known as diversity jurisdiction). 28 U.S.C. § 1332(a). Accordingly, for a
12 federal court to have diversity jurisdiction over a matter, the party asserting jurisdiction must
13 show: (1) complete diversity of citizenship among opposing parties, and (2) an amount in
14 controversy exceeding \$75,000. *Id.* When the plaintiff seeks declaratory or injunctive relief,
15 the amount in controversy is measured by "the value of the object of the litigation." *Hunt v.*
16 *Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). A corporation is deemed to be
17 a citizen of its state of incorporation and where its principal place of business is located. 28
18 U.S.C. § 1332(c)(1). The citizenship of a natural person is determined by that person's
19 presence (residence) in the state plus an intent to remain there permanently or indefinitely.
20 See *Lew v. Moss*, 797 F.2d 747, 749-50 (9th Cir. 1986).

21 **II. Motion to Dismiss**

22 The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test
23 the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
24 "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled
25 to offer evidence to support the claims." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th
26 Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

27 To avoid a Rule 12(b)(6) dismissal, a complaint must plead "enough facts to state a
28 claim to relief that is plausible on its face." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,

1 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim
2 is plausible on its face "when the plaintiff pleads factual content that allows the court to draw
3 the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.*
4 *Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). Although detailed factual allegations are
5 not required, the factual allegations "must be enough to raise a right to relief above the
6 speculative level." *Twombly*, 550 U.S. at 555. All well-pleaded factual allegations will be
7 accepted as true and all reasonable inferences that may be drawn from the allegations must
8 be construed in the light most favorable to the nonmoving party. *Broam v. Bogan*, 320 F.3d
9 1023, 1028 (9th Cir. 2003).

10 If the court grants a motion to dismiss a complaint, it must then decide whether to grant
11 leave to amend. The court should freely give leave to amend when there is no "undue delay,
12 bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing
13 party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*,
14 371 U.S. 178, 182 (1962); see also FED. R. CIV. P. 15(a). Generally, leave to amend is only
15 denied when it is clear that the deficiencies of the complaint cannot be cured by amendment.
16 *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

17 DISCUSSION

18 I. Motion to Remand

19 In support of his motion to remand, Plaintiff first claims that this matter should be
20 remanded to state court because the claims for relief have not been preempted by the
21 National Bank Act. (Mot. to Remand (#6) at 2). This case however was removed to federal
22 court under diversity jurisdiction and not federal question jurisdiction, and thus this argument
23 is irrelevant.

24 Plaintiff next argues that the Court should abstain from asserting jurisdiction under the
25 doctrine of *Pullman* abstention. *Pullman* abstention "is a narrow exception to the district
26 court's duty to decide cases properly before it" that applies "when difficult and unsettled
27 questions of state law must be resolved before a substantial federal constitutional question
28 can be decided." *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 801 (9th

1 Cir. 2001) (quotations omitted). Under the *Pullman* abstention doctrine, abstention is required
2 when: (1) the case involves a sensitive area of social policy best left to the states; (2)
3 clarification of state law by the state courts may obviate the need for constitutional adjudication
4 by the federal court; and (3) there is uncertainty as to the meaning of the potentially
5 determinative state law at issue. *Id.* at 802.

6 *Pullman* abstention is inappropriate in this case. Plaintiff's complaint does not present
7 a federal constitutional question, and therefore the justification behind *Pullman* is inapplicable
8 to this matter. Additionally, although wrongful foreclosure may be a sensitive area of state law,
9 the law of foreclosure is generally settled in Nevada and Plaintiff has not presented any state-
10 law issue which requires clarification. For these reasons, Plaintiff's argument that the *Pullman*
11 abstention doctrine requires the Court to remand this matter to state court lacks merit.

12 Finally, Plaintiff argues that the Court should remand the case to state court because
13 there is not complete diversity between the parties because SPL, Inc. is allegedly a Nevada
14 corporation. (Reply (#15) at 2). Plaintiff does not appear to be certain as to who he is suing
15 by naming SPL, Inc. as a defendant, but contends that a dissolved corporation named "SPL
16 Corporation" appears on the Nevada Secretary of State's website and concludes this SPL
17 Corporation is the SPL, Inc. listed as a defendant in his complaint. (*Id.*). Dissolved
18 corporations can sue and be sued in their own name in Nevada for at least two years after
19 dissolution. See *McManus v. McManus Fin. Consultants, Inc.*, 2010 WL 4290866, at **4-5,
20 (D. Nev. 2010). Plaintiff therefore contends that because SPL, Inc. and Plaintiff are both
21 citizens of Nevada, complete diversity is not present in this matter.

22 Defendants however have presented compelling evidence that it is SPL Express,
23 Inc.—a California corporation—which Plaintiff is actually attempting to sue and not the defunct
24 SPL Corporation listed on the Nevada Secretary of State's website. Defendants have
25 presented communications from Vincent Pappas, President of SPL Express, Inc., in which
26 Pappas states that SPL Express, Inc. is a California corporation which records documents with
27 county recorders on behalf of the trustees listed on deeds of trusts, which is the exact action
28 the SPL, Inc. identified in the complaint had performed. (Email (#17-1) Ex. E). Pappas has

1 also indicated that SPL Express, Inc. is often identified to county recorder offices as SPL or
2 SPL, Inc. for convenience purposes. (*Id.*). The SPL Corporation Plaintiff contends is the SPL,
3 Inc. in this action however seems to have been dissolved for years and thus was not likely to
4 have recorded the notice of default on June 30, 2011 as Plaintiff claims. Accordingly,
5 Defendants have met their burden and shown by a preponderance of the evidence that the
6 SPL, Inc. sued by Plaintiff is in fact SPL Express, Inc.—a California corporation. As Plaintiff
7 is a Nevada resident and all defendants are residents of states other than Nevada, complete
8 diversity is satisfied in this matter.

9 Because this Court has diversity jurisdiction over this case and no reason exists to
10 abstain from adjudicating the dispute, Plaintiff's motion to remand is denied.

11 II. Motion to Dismiss

12 Only three claims are stated in Plaintiff's complaint: (1) unlawful foreclosure; (2)
13 declaratory relief; and (3) injunctive relief. (Compl. (#1-2) at 9-12). Plaintiff's claims for
14 injunctive relief and declaratory relief however are remedies and not independent causes of
15 action. See *Stock W., Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221,
16 1225 (9th Cir. 1989); *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 490 F.Supp.2d 1091,
17 1130 (D. Nev. 2007); *Miller v. MERSCORP, Inc.*, 2011 WL 6097751, at *8 (D. Nev. 2011);
18 *Anderson v. Deutsche Bank Nat'l Trust Co.*, 2010 WL 4386958, at *5 (D. Nev. 2010).
19 Consequently, these claims are dependent upon the only substantive claim before this Court:
20 the claim for unlawful foreclosure.

21 Under Nevada law, to succeed on a claim of wrongful foreclosure a plaintiff must show
22 that a lender wrongfully exercised the power of sale and foreclosed upon his or her property
23 when the homeowner was not in default on the mortgage loan. See *Collins v. Union Fed. Sav.*
24 *& Loan Ass'n*, 662 P.2d 610, 623 (Nev. 1983). Plaintiff here has not alleged he was not in
25 default of the loan or that the Property has been sold at a foreclosure sale. Accordingly,
26 Plaintiff has failed to state a claim for wrongful foreclosure.

27 However, drawing all reasonable inferences in favor of the nonmovant as the Court
28 must for the purposes of this motion, it appears Plaintiff intended to allege that the foreclosure

1 was wrongful in the sense that it was statutorily defective. NRS § 107.080 and NRS § 107.086
2 set out certain procedures that must be followed before a trustee may execute the power of
3 sale, and if these procedures are not substantially complied with, the sale may be declared
4 void. NEV. REV. STAT. § 107.080(5)(a). In order to foreclose on the borrower, the beneficiary,
5 successor in interest of the beneficiary or the trustee must first execute and cause to be
6 recorded a notice of default. *Id.* § 107.080(2)(c). The notice of default must then be mailed
7 to the borrower along with a form upon which the borrower may indicate an election to enter
8 into mediation under the Nevada Foreclosure Mediation Program. *Id.* § 107.086(2)(a)(3). The
9 foreclosure then may not proceed until a certification has been recorded from the Mediation
10 Administrator providing that mediation is either not required or has been completed. *Id.* §
11 107.086(2)(c).

12 In the present matter, CRC is the trustee listed on the Deed of Trust and is the party
13 commencing the foreclosure proceeding. Accordingly, CRC had the proper authority to initiate
14 the foreclosure. Plaintiff however contends that after filing the notice of default, CRC failed
15 to mail to him a form indicating his right to mediation and upon which he could elect to enter
16 into or waive mediation in violation of NRS § 107.086(2)(a)(3). (Compl. (#1-2) at 6). Plaintiff
17 further alleges that no certificate was ever recorded from the Mediation Administrator providing
18 that no mediation was required or that mediation has been completed, in violation of NRS §
19 107.086(2)(c). (*Id.*). Defendants nowhere in their motion to dismiss claim that the form
20 required under NRS § 107.086(2)(a)(3) was sent to Plaintiff. Defendants have also failed to
21 produce a certificate from the Mediation Administrator indicating their compliance with NRS
22 § 107.086(2)(c). As the Court must accept Plaintiff's allegations as true and because
23 Defendants have not argued that these allegations are incorrect or produced evidence
24 demonstrating their compliance with NRS § 107.086, Defendants' motion to dismiss is denied
25 as to this claim.

26 Plaintiff also seems to allege that the foreclosure was defective because Defendants
27 violated NRS § 107.200 by failing to respond to Plaintiff's request for a statement regarding
28 the secured debt. Under NRS § 107.200, the beneficiary of a deed of trust must respond to

1 a request for a statement made pursuant to NRS § 107.220 within 21 days after receiving the
2 request and provide certain information to the requestor regarding the secured debt. The
3 beneficiary however need not respond to the request if the request was untimely. NRS §
4 107.240 provides that "the beneficiary may refuse to deliver the statement unless the written
5 request for the statement is received before the publication of a notice of sale or the notice of
6 the date of sale established by a court." Here, CRC recorded a notice of sale on October 7,
7 2011 and Plaintiff did not make his request for a NRS § 107.200 statement until November 1,
8 2011, nearly a month after the recording of the notice of sale. (Notice of Default (#8-2);
9 Compl. (#1-2) at 7). As Plaintiff's request was untimely, Defendants did not violate NRS §
10 107.200 by failing to respond to the request. Defendants' motion to dismiss is accordingly
11 granted as to the claim that Defendants violated NRS § 107.200 and the claim is dismissed
12 without leave to amend.

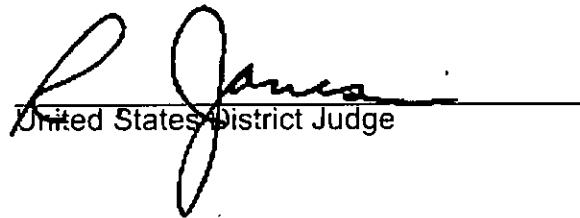
13 Even though Plaintiff has failed to state a claim for wrongful foreclosure and violations
14 of NRS § 107.200, Plaintiff has successfully stated a claim for statutorily defective foreclosure
15 by alleging Defendants violated NRS § 107.086 by failing to mail the required mediation forms
16 and failing to record a certificate from the Mediation Administrator. As Plaintiff has stated a
17 claim for relief for defective foreclosure, the Court hereby denies Defendants' motion to
18 dismiss the defective foreclosure claim along with Plaintiff's dependent claims for declaratory
19 relief and injunctive relief.

20 CONCLUSION

21 For the foregoing reasons, IT IS ORDERED that the Court denies Plaintiff's motion to
22 remand (#6).

23 IT IS FURTHER ORDERED that the Court grants in part and denies in part Defendants'
24 motion to dismiss (#8). Specifically, Defendants' motion is granted as to Plaintiff's claims of
25 wrongful foreclosure and violation of NRS § 107.200 contained in count one and these claims
26 are dismissed without leave to amend. Defendants' motion to dismiss however is denied as
27 to Plaintiff's claims of defective foreclosure for failure to comply with NRS § 107.086 (implied
28 in count one), declaratory relief (count two), and injunctive relief (count three).

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2 DATED: This 11th day of May, 2012.

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United States District Judge
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